

COVID-19 TASK FORCE

**Expect
Insights**

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COVID-19 and Unprecedented: Litigation Insights, Issue 19

As we continue our weekly update on COVID-19 related litigation, we have decided that this 19th issue of *Unprecedented* is the most fitting time for a format change to make viewing our content easier. Now, all content is included directly in our e-blast, so you can spend less time clicking links, and more time learning about the evolving trends of COVID-19 lawsuits.

In this issue, we discuss the most recent denial of plaintiffs' multi-district litigation request to consolidate a group of similar lawsuits. We also look at several more challenges to mask mandates, business closures, and other executive orders, as well as important information for employers regarding COVID-19 liability protections. Finally, we end with an update on business interruption insurance lawsuits arising from forced business closures, and another recent win for insurance companies.

If there are certain topics you would like us to review, please [let us know](#).

We hope you enjoy reading.

[COVID-19 Task Force](#)



Small Businesses Denied MDL for Chase Virus Loans Suits

"The JPML said in an order that while there is some overlap in the small-business plaintiffs' cases against Chase, the individualized nature of the factual issues surrounding their respective loan applications will take away from the potential efficiency benefits of centralizing them in an MDL."

Why this is important: Plaintiffs' attorneys have been trying to push COVID-19-related claims toward multi-district litigation ("MDLs") from almost the first filing. There are certainly arguments for efficiency: consolidating cases for pretrial administration and rulings can save money and ensure consistent rulings. But there are also concerns that MDLs too often pull in marginal claims, whose main purpose is to increase the costs of settlement.

So far, however, plaintiffs' requests for MDLs have fallen on deaf ears. The latest example comes in the case of the Paycheck Protection Program ("PPP") lawsuits filed against Chase. Those lawsuits allege that Chase prioritized higher-dollar PPP applications, which generated higher fees, and the plaintiffs' attorneys behind them argued that factual and legal commonalities supported consolidation. Chase, however,

argued that the cases had enough factual differences--and, equally important, there were few enough of them--that consolidation wasn't warranted. The Judicial Panel on Multidistrict Litigation ("JPML"), which hears these requests, agreed. It denied request to create an MDL for the claims against Chase, as it also did for similar claims against Bank of America and Wells Fargo. Each lawsuit will thus now be litigated and tried separately. --- [Joseph V. Schaeffer](#)

Lawsuits Fighting Mask Mandates, Business Closures from COVID-19 from Around the South

"There's been a significant bump in lawsuits across several Southern U.S. states regarding mandated coronavirus restrictions, and so far, some have not fared well for those suing."

Why this is important: The first stay-at-home orders were almost immediately followed by the first lawsuits challenging them. The same is true for orders requiring face coverings in public areas. And though most rely on weighty constitutional principles, like due process, equal protection, and free expression, few have found success. Courts have generally found that governments have wide latitude to address the public health risks presented by COVID-19. And, for that reason, as a recent survey by the Tennessean of challenges across the South finds that most have been dismissed, or appear on their way. --- [Joseph V. Schaeffer](#)

Orland Park Dealt Setback in Lawsuit Challenging COVID-19 Restrictions

"The lawsuit alleges the state-imposed restrictions violate the due process and equal protection clauses of the Constitution and that Pritzker overstepped his authority."

Why this is important: As discussed in our [June 29, 2020 issue of Unprecedented](#), the village of Orland Park, Illinois, along with two residents and the co-owner of an Orland Park pub, filed a lawsuit in federal court challenging Governor J.B. Pritzker's reopening plan. The lawsuit, filed on June 16, 2020, alleges that Governor Pritzker's restrictions violate the due process and equal protection clauses of the Constitution. The plaintiffs were dealt a considerable blow on August 1, 2020, when Judge Andrea R. Wood of the U.S. District Court for the Northern District of Illinois issued a memorandum opinion and order denying plaintiffs' motion seeking a temporary restraining order and preliminary injunction to overturn a number of executive orders issued by Governor Pritzker related to the pandemic.

In Judge Wood's memorandum opinion, she outlined that "[t]he Executive Orders--which limit groups of people from gathering, especially in indoor spaces--undoubtedly have a real and substantial relationship to preventing the spread of COVID-19, a disease which spreads primarily from close contact in indoor spaces." Judge Wood also emphasized that "the Governor has sweeping powers in the event a disaster strikes all or part of Illinois." Judge Wood further reasoned that "Plaintiffs have a negligible likelihood of success on the merits." Judge Wood's denial does not end the case, but constitutes a significant blow to the plaintiffs. Click [here](#) for the memorandum opinion and order. --- [Wesley A. Shumway](#)

Fireworks Companies are Suing New York State Over COVID-19 Cancellations

"The companies claim these restrictions effectively canceled fireworks displays across the summer."

Why this is important: The owners of four fireworks display companies have filed suit in federal court against New York Governor Andrew Cuomo, New York Attorney General Letitia James, and the New York State Health Commissioner for COVID-19 restrictions that they claim have harmed their businesses. The suit alleges that the New York State restrictions limiting the number of people in gatherings of 50 or fewer make fireworks displays, both public and private, virtually illegal. Of particular importance to the plaintiffs are the series of exemptions to the ban that were issued for certain outdoor events like graduations and protests, arguably indicating that a less restrictive alternative was available. They seek

an order finding the restrictions unconstitutional and a temporary injunction preventing the state from enforcing the 50-person limits on gatherings. This case has major implications regarding the legality and enforceability of not just Gov. Cuomo's limits on gatherings, but on public safety gathering size limits issued all around the country by state and local governments. --- [Risa S. Katz-Albert](#)

[Bailey Lawsuit Requests Gov. Pritzker be Jailed If He Does Not Rescind COVID-19 Executive Orders](#)

"The motion is based on the fact Pritzker has ignored previous orders by the Court and continues to issue Executive Orders related to COVID-19."

Why this is important: The ongoing litigation between Illinois State Representative Darren Bailey and Illinois Governor J.B. Pritzker took a serious and somewhat bizarre turn last week, as Bailey filed a motion to hold Pritzker in contempt that could result in the Governor being jailed. The lawsuit was filed back in April in Clay County Circuit Court, where Bailey alleges that the Governor exceeded his authority in issuing executive orders relating to COVID-19 and violated the constitutional rights of Illinois' citizens. Pritzker, like most state governors, has faced some public backlash and litigation related to his executive orders and/or actions regarding the pandemic. What makes this case different, however, is that Bailey has had some success, where other circuit courts have sided largely, if not entirely, with Governor Pritzker. In this latest motion, Bailey seeks to have Pritzker jailed until the Governor rescinds all executive orders he has issued since April. The Clay County Circuit Court Judge almost immediately granted Bailey's motion, and ordered for Pritzker to appear in court, in person, for a contempt hearing on the issue. When asked about the Bailey lawsuit and contempt motion, Pritzker made it clear he was focused on the pandemic, and pointed to the other cases in Illinois that have upheld his executive actions as constitutional. It has yet to be seen whether a down state judge will find that executive action is unconstitutional (a decision guaranteed to be appealed to higher courts) or put the Governor in jail for refusing to rescind prior executive orders. Given that Pritzker and other state officials continue to face some backlash for their COVID-19 response, it is important to keep an eye on this case. If Bailey's motion is successful, it may become a tactic picked up in other states to continue to challenge executive authority. --- [Chelsea E. Thompson](#)

[The First Wave of COVID-19 Workplace Lawsuits is Here](#)

"Major employers nationwide are facing a wave of lawsuits filed by workers claiming they contracted the novel coronavirus as a result of their employer's negligence-a trend that's sparking debate over whether Congress should grant businesses liability protections during the epidemic."

Why this is important: As workplace negligence lawsuits continue to rise as a result of the COVID-19 pandemic, Congress is debating whether employers should enjoy liability protections as long as they have taken action to comply with government safety guidelines. Around 69 lawsuits claiming that employers exposed or possibly exposed its employees to COVID-19 have been filed so far. These lawsuits generally claim that the employer failed to follow federal or state guidelines in protecting its employees. Those in favor of providing employer immunity argue that as long as the employer has made reasonable, good-faith efforts to follow safety guidelines, they should not be subject to legal claims if an employee somehow contracts the virus. On the other hand, some believe that providing liability protections to employers will cause them to relax their safety measures because they no longer fear legal action. We will provide updates on this important issue for employers as the debate continues forward. --- [Megan W. Mullins](#)

[Allowing COVID-19 Wrongful Death Lawsuit to Proceed Would 'Open the Floodgates to Potentially Thousands of Speculative Claims,' Argues Tyson Foods](#)

"As lawmakers argue whether COVID-19 liability shields for employers should be built into the next stimulus package, Tyson Foods has told a court in Texas that it can't be held liable for the death of one of

its employees because his family can't prove he contracted the virus at work."

Why this is important: As discussed above, whether to include liability protections for businesses and employers has been a hot topic in the most recent round of negotiations over a new coronavirus relief bill. As the debate drags on, COVID-19-related lawsuits continue to be litigated. One such case is a wrongful death lawsuit pending in the United States District Court for the Eastern District of Texas brought by the family of a former employee of Tyson Foods, Inc., who died of complications related to COVID-19. The plaintiffs allege that Tyson was grossly negligent by failing to maintain a safe distance between employees, failing to provide PPE, and failing to require sick employees to stay home. In a recently filed motion to dismiss, Tyson argues that allowing the case to proceed would "open the floodgates to potentially thousands of speculative claims." Specifically, Tyson argues that the plaintiffs failed to offer any well-pleaded factual allegations that the former employee was infected at work and that the former employee contracted COVID-19 due to Tyson's alleged negligence. While this is only one example of the wave of COVID-19-related lawsuits being filed around the country, it may well serve as a barometer on the likely success of these lawsuits. --- [Joseph A. Ford](#)

COVID-19 Closure Orders Not 'Physical Loss,' DC Judge Rules

"A District of Columbia judge shot down a bid by a group of restaurants in the area to get coverage for business interruptions during the COVID-19 pandemic, ruling that government shutdown orders don't constitute a 'direct physical loss' that triggers the policy."

Why this is important: Few industries have been hit harder by the COVID-19 pandemic than the restaurant industry, particularly as government shutdown orders have required restaurants to limit or even cease operations. And so few industries have been more intent to establishing business-interruption or civil-authority coverage under their insurance policies. A recent decision from the D.C. Superior Court (the District of Columbia's equivalent to a state trial court), however, dealt a major blow to those efforts.

The plaintiffs, a group responsible for some of D.C.'s best-known restaurants, had argued that D.C. Mayor Bower's shutdown orders triggered coverage. But like plaintiffs raising similar claims before them, they ran into the "direct physical loss" requirement under their policies. The plaintiffs had tried to argue that Mayor Bowser's orders were "direct," that the presence of the novel coronavirus was "physical," and the loss of their restaurants' use was a "loss." But the D.C. Superior Court disagreed. It held that "direct" and "physical" must be interpreted as modifying "loss," meaning that there must be some direct physical intrusion on to the insured property. The D.C. Superior Court held that there was no evidence of any such loss to the plaintiffs and that their injuries resulted from the "forced closure of the premises for reasons exogenous to the premises themselves."

The D.C. Superior Court's opinion is just the most recent in a string of victories in favor of the insurance industry--as many predicted would happen when the claims first started to be filed. Given the high stakes for insureds, however, it seems unlikely that these coverage disputes will abate any time soon. --- [Joseph V. Schaeffer](#)

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